ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

L. RENE WEBER, MIKE WEBER, LANCE BESHARA, THERESA BESHARA, CHRISTIAN LINGAMFELTER, LU LINGAMFELTER, and LESLIE FINE	§	
VS.	§	ACTION NO. 4:92-CV-267-Y
TRINITY MEADOWS RACEWAY, INC.	§	

OPINION

Plaintiffs filed this citizen suit under section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), (hereinafter "the Clean Water Act" or "the Act") on April 13, 1992, alleging that Trinity Meadows Raceway, Inc. ("the Raceway") is engaging in polluting and filling activities in the Clear Fork of the Trinity River. Additionally, Plaintiffs alleged state law nuisance and negligence claims. Plaintiffs demanded a jury trial on all of their claims and sought a temporary restraining order, preliminary and permanent injunction, actual and punitive damages, costs, fees, and civil penalties.

In an order filed on April 14, the Court denied Plaintiffs' request for a temporary restraining order and set a hearing on the request for a preliminary injunction for May 1. The hearing was subsequently continued to May 7. That day, the Raceway filed its original answer and counterclaim to Plaintiffs' original complaint. The Raceway's counterclaim sought costs of litigation, including reasonable fees for attorneys and expert witnesses, as provided by

33 U.S.C. § 1365(d). The preliminary injunction hearing lasted two days, during which Plaintiffs waived their request for preliminary injunctive relief based on the nuisance and negligence claims but pursued the request as to the Clean Water Act claim. On June 23, the Court issued its memorandum opinion and order denying Plaintiffs' request for a preliminary injunction.

On June 24, 1993, Plaintiffs filed their amended complaint. Plaintiffs' amended complaint asserts the same causes of action as were asserted in the original complaint and again demands a jury trial on all of Plaintiffs' claims. On July 2, the Raceway filed its amended answer and counterclaim, again seeking costs and fees in accordance with § 1365(d).

A jury trial was commenced on January 9, 1995. During the trial, Plaintiffs waived their jury demand as to the Clean Water Act claim. On January 20, the jury returned a verdict in favor of the Raceway on the nuisance and negligence claims. Both parties subsequently submitted posttrial briefs and proposed findings of fact and conclusions of law regarding the Clean Water Act claim.

After consideration of the parties' submissions, the admissible evidence, and the applicable law, the Court issues this opinion. As a preliminary manner, the Court notes that in accordance with Federal Rule of Civil Procedure 65(a)(2), the Court has considered the testimony and evidence presented at the preliminary injunction hearing in making its findings and conclusions.

I. FINDINGS OF FACT

Plaintiffs are individuals who reside on Royal View Court, in the City of Willow Park, Parker County, Texas. The Raceway is a corporation existing under the laws of the State of Texas with its principal place of business at Willow Park. The Raceway currently owns and operates a racetrack adjacent to Plaintiffs' property. The Raceway's racetrack operations, which are licensed by the Texas Racing Commission, are also adjacent to the Clear Fork of the Trinity River. The Clear Fork of the Trinity River is a water of the United States for purposes of the Clean Water Act.

In 1982, plaintiffs Rene and Mike Weber ("the Webers") began looking for property on which to build a home. They had previously lived in Austin, Texas, and were looking for terrain and trees similar to those found in Austin. They looked at property in various locations, including the lot on Royal View Court where their residence is located now. The lot on Royal View Court sat on top of a bluff overlooking a large meadow. Across the meadow to the west was a tree-lined river--the Clear Fork of the Trinity. The Royal View Court lot provided a good view of both the meadow and the tree-lined portion of the river.

The Webers were told by their real estate broker that the meadow would never be developed, so they purchased the lot and built their home. After they moved into their home in 1983, and prior to the Raceway's purchase of the meadow area, the Webers enjoyed being outside and observing the ducks, heron, egret, quail, and deer that frequented the river and meadow. At least twice per

month, and approximately two times per week in the summertime, they took walks with their children across the meadow to the banks of the river, where they searched for arrowhead and fossils. On these trips, they often waded or fished in the river.

When the Webers purchased their lot, a small racetrack was adjacent to the meadow, out of view from the Weber's property. In the latter part of 1989, they learned that the Raceway had purchased the existing racetrack and the meadow. That same year, the Raceway began expanding the racetrack operations into the meadow, constructing its barn facility below the Weber's home on the bluff. It began stabling horses there in 1991.

When the Raceway first started construction, there was no man-made drainage system in place. The area was a floodplain, draining naturally into the Clear Fork of the Trinity River. By the end of February 1992, the Raceway had constructed a drainage system. A sanitary sewer system carries waste water from the barns, the restrooms, the laundry room in the paddock, and the jockeys' quarters to a lift station, where it is pumped into retention tanks and then hauled to the City of Weatherford's sewage treatment plant. The drainage system for the area surrounding the barns, however, drains at two outfall points directly into the Trinity through pipes buried underneath the Raceway's property.

Presently, the Raceway's barn facility consists of eleven completed barns which are grouped together on approximately nine acres of the former meadow. In this area, the Raceway stables 1009 horses for more than forty-five days of the year. At all times

when the horses are on the Raceway's property, they are confined; they are never allowed to roam freely around or wander off of the Raceway's property.

The horses are exercised in the area surrounding the barns on electric walkers known as "hotwalkers." There are approximately fifteen hotwalkers throughout the area surrounding the Raceway's barns, each of which can exercise up to four horses at a time. While the horses are being exercised on the hotwalkers, and while they are being walked to the track or between the barns, they often produce equine waste in the form of manure and urine.

Interspersed throughout the area surrounding the barns are large, three-sided bins used to contain waste from the floor of the barns. Approximately half of the bins currently used at the Raceway are covered. All of the bins are elevated and sloped back toward the walled sides of the bins in an effort to keep the waste from falling out of the open sides of the bins. The waste, referred to as "muck," includes straw and wood shavings that are spread on the floors of the horses' stalls in the barns. Coming as it does from the floor of the barns, where 1,009 horses are stabled, the muck necessarily contains a fairly significant amount of equine waste. Once removed from the barns, the muck is stored in the 'muck bins' until it is removed from the Raceway's premises. The Raceway contracts with the Clear Fork Materials company to remove the muck on a daily basis by using front-end loaders to lift the muck out of the bins and then dump it into a dump truck, which then hauls the muck off the premises for composting and sale as a

natural fertilizer.

Because of the manner in which the muck from the barns is handled at the Raceway's facility, it is inevitable that a portion of same is discharged into the river whenever it rains. For example, the Webers testified and presented videotapes showing that when muck in the muck bins is lifted by front-end loader and dumped into a truck for removal from the Raceway's premises, some of the muck is dropped from the loader into the roadway or is pushed out of the muck bin onto the ground surrounding the bin. If the loader happens to be operating on a windy day, the "stirring" caused by the attempted removal of the muck causes some of the muck to be blown out of the bin. Additionally, although the muck is supposed to be removed on a daily basis, the muck bins often are so full that they overflow, causing the muck to spill out of the bins and onto the roadways and other area surrounding the bins. Indeed, Plaintiffs presented videotape evidence showing two of the Raceway's employees dumping full wheelbarrows of muck into the roadway at the mouth of an overflowing bin because the bin was already too full to accommodate more muck. Furthermore, on several occasions, the Webers have witnessed the Raceway's employees using the muck to create a pathway for the horses to walk on from the stables to the hotwalkers when the ground is wet.

Prior to installation of the Raceway's drainage system, the equine waste and muck that found its way to the ground in the area surrounding the barns washed directly into the Clear Fork of the Trinity River when it rained. Even after the installation of the

drainage system, however, this waste continues to drain into the river since the drainage system for the area surrounding the barns discharges directly into the river. Although this system contains some 'sandtraps,' which are designed to collect solid materials out of the draining liquid so that they do not make their way into the river, Ms. Weber testified that the Raceway has had problems with these sandtraps working properly. Additionally, the sandtraps do not catch any equine waste that has dissolved before reaching the sandtraps. Thus, the dissolved waste is discharged into the river at the system's outfall points.

The Raceway previously represented to Plaintiffs that it would obtain and use four-sided, covered, self-contained muck bins in an attempt to remedy some of the problems Plaintiffs were experiencing. Indeed, Jim Martin testified at the preliminary injunction hearing that, at that time, the Raceway had been researching and was ready to contract with someone to handle these four-sided containers in a manner whereby they would be placed onto a truck and hauled off daily for emptying, rather than being unloaded by a front-end loader on the Raceway's property. Although these self-contained muck bins apparently were purchased in 1992, they have never been used.

In August 1991, the Webers met with Jack Lenavitt, the majority shareholder and an officer and director of the Raceway. At that meeting, the Webers told Lenavitt about some of the problems that the homeowners were having with the conditions caused by the Raceway's facilities. Lenavitt indicated that he was

surprised that there had been so little opposition to those conditions, that they would only get worse, and that he would spend hundreds of thousands of dollars to fight Plaintiffs.

On February 23, 1992, after the Raceway began its discharging activities, the Webers walked along the river, but not on the side of the river owned by the Raceway. Rather, they obtained access to the river from Kings Gate Road, a public roadway which crosses the river near the Raceway's property. Additionally, Robert Brandes testified that he has traveled on Crown Road, on the western side of the Raceway's property, and viewed the river and the Raceway's facilities from that location. Owen Borger also testified at the preliminary injunction hearing that while he was traveling over the river on Crown Road, he observed someone from the Raceway's property discharging what appeared to be waste water into the river. Thus, the Court finds that the Webers continue to have public access to the river from either Kings Gate Road or Crown Road.

During this trip to the western side of the river, the Webers observed a drainage pipe that came from underneath the racetrack on the Raceway's property and that discharged a "brownish red liquified substance with solid particles shooting out of it into the river." (Prelim. Inj. Hr'g Tr. Vol. I at 26.) Mrs. Weber indicated that the substance smelled like urine and manure. Similarly, Mr. Weber testified that at this discharge point, he smelled a "very sour smell. . . like sewage." (Prelim. Inj. Hr'g Tr. Vol. I at 85.) The bank of the river around the drainage pipe

had severely eroded, exposing the roots of the remaining trees in the area.

Mrs. Weber testified that she no longer desires to go down to the river or through the meadow because the area is "not attractive anymore." (Prelim. Inj. Hr'g Tr. Vol. I at 22.) She also testified that she believes that the river is being destroyed by the operations of the Raceway, and that she has been injured by this destruction in that she is no longer able to use the river. The Court finds that the degradation of the portion of the river adjacent to the Raceway's property is the main reason why the Webers have ceased enjoying that portion of the river.

The Court further finds that the Raceway has discharged pollutants in the form of equine and other waste emanating from its barns and the area surrounding same ("the barn area") into the Clear Fork of the Trinity River, and that the discharges are a contributing factor, if not the major cause, of the degradation of the portion of the river that is adjacent to the Raceway's property. Specifically, the Court finds that these discharges occurred on or about the following dates: (1) August 30, 1991, (2) September 20, 1991, (3) October 26, 1991, (4) October 28, 1991, (5) December 21, 1991, (6) January 17, 1992, (7) January 27, 1992, (8) February 23, 1992, (9) February 24, 1992, (10) May 19, 1992, (11) May 22, 1992, (12) September 1, 1992, (13) October 7, 1992, (14) January 10, 1993, (15) January 19, 1993, (16) February 4, 1993, (17) March 21, 1993, (18) April 1993, (19) May 1993, (20) August 1993, (21) October 1993, (22) first week of March 1994, (23) April

1994.[1]

On May 6, 1992, soon after the filing of this suit and immediately prior to the hearing on Plaintiffs' application for a preliminary injunction, the Raceway filed an application with the Environmental Protection Agency for a National Pollutant Discharge Elimination System ("NPDES") individual waste water discharge permit applicable to a concentrated animal feeding operation ("CAFO"). As of the trial in this cause, the EPA had not acted on the Raceway's application for the individual NPDES permit for CAFOs. On February 8, 1993, however, Region VI of the EPA issued final regulations establishing a general permit, in certain situations, for discharges from CAFOs, which permit became effective March 10, 1993. Although the Raceway's application for an individual permit was pending with the EPA at the time the general permit became effective, the Raceway did not file a Notice of Intent ("NOI") to be covered by the general permit for CAFOs,

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[1]Plaintiffs have requested that the Court take judicial notice of all of the days that it rained in 1993 and 1994 and find that each of those days constitute a separate violation of the Act. (Pls.' Proposed Findings of Fact and Conclusions of Law on the Clean Water Act Claims at 6-7.) Plaintiffs have provided the Court with insufficient information, however, upon which to base judicial notice of the days of rain. Federal Rule of Evidence 201(b) permits a court to take judicial notice of adjudicative facts when those facts are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." Fed. R. Evid. 201(b). The rule further provides that the court must "take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). This Court does not believe that the days of rain in this area in 1993 and 1994 are generally-known facts. Although the Court suspects that they are "capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned," Plaintiffs have failed to present the Court with any such sources. *See Clark v. South Central Bell Tel. Co.*, 419 F. Supp. 697, 704 (W.D. La. 1976) (refusing to take judicial notice because facts for which notice was requested were not matters of general knowledge, and no 'reliable sources' for those facts were placed before the court).

nor has it complied with the requirements of this general permit, such as monitoring the discharge and reporting the nature and extent of same to the EPA.

On September 9, 1992, EPA issued a general permit for storm water discharges associated with industrial activity, which permit became effective that same date. On October 1, 1992, the Raceway filed a NOI to be covered by the EPA general permit for storm water discharges associated with industrial activity. The letter accompanying the Raceway's NOI to be covered by the storm water general permit indicates that once final regulations for Region VI's general permit for CAFOs are issued, the Raceway will seek coverage under that permit and will submit a Notice of Termination ("NOT") of coverage under the storm water general permit. The Raceway never filed an NOT, however, with respect to the storm water permit.

Plaintiffs gave the Raceway notice of their intent to sue the Raceway pursuant to 33 U.S.C. § 1365(b)(1)(A) on or about February 7, 1992, more than sixty (60) days prior to the filing of this lawsuit.

II. CONCLUSIONS OF LAW

A. Jurisdiction

The Court has jurisdiction over this suit pursuant to 28 U.S.C. § 1331, in that this is a citizens' suit brought in accordance with section 505(a) of the Clean Water Act. *See* 33

U.S.C.A. § 1365(a)(1) (West 1986 & Supp. 1995). Section 505(a) of the Clean Water Act allows a private right of action against persons allegedly violating certain provisions of the Clean Water Act. *See id.*

B. Standing

The Court finds that the Webers have standing to bring their Clean Water Act claims against the Raceway, but that the other plaintiffs do not. Standing analysis focuses on whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). The standing analysis under the Clean Water Act is a constitutional, not statutory one. *Save Our Community v. United States Envtl. Protection Agency*, 971 F.2d 1155, 1161 n.11 (5th Cir. 1992). Establishing constitutional standing requires the satisfaction of a three-part test:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and is "likely to be redressed by a favorable decision."

Id. at 1160 (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)); *see also Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 555 (5th Cir. 1996). The Webers have met each of these elements.

The first element, injury, is satisfied. As noted by the Fifth Circuit, "harm to aesthetic, environmental, or recreational

interests is sufficient to confer standing, provided that the person seeking review is among the injured." *Save Our Community*, 971 F.2d at 1161; *see also Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 71 (3rd Cir. 1990) (finding sufficient injury where a member of the plaintiff organization averred that he was offended by the brown color and bad odor of a water body adjacent to a park where he went hiking and bird watching), *cert. denied*, 498 U.S. 1109 (1991); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1112 n.3 & 1113 (4th Cir. 1988) (finding injury to aesthetic and environmental interest sufficient where pollution would affect river along which a single member of the plaintiff group hiked), *cert. denied*, 491 U.S. 904 (1989); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (injury sufficiently demonstrated by testimony regarding the recreational use of the river and the offensive nature of the pollution to aesthetic values). Additionally, "'[t]hese injuries need not be large, an "identifiable trifle" will suffice.'" *Save Our Community*, 971 F.2d at 1161 (quoting *Powell Duffryn*, 913 F.2d at 71). As indicated in the findings of fact, the Webers testified that prior to the Raceway's discharging activities, they enjoyed observing the wildlife that frequented the river near the Raceway's property, and at least twice per month, they walked along the banks of the river and waded and fished in the portion of the river adjacent to the Raceway's property. The Webers' testimony reflects that they have only been down to the portion of the river adjacent to the Raceway's property

once since the Raceway began discharging in the river, and that the condition of that portion of the river had vastly deteriorated as a result of the Raceway's discharges. The Court finds that the injury caused to the Webers' recreational, aesthetic, and environmental interests as a result of the alleged pollution is a sufficiently cognizable injury for purposes of standing.

The Raceway contends that the Webers failed to show a cognizable injury for standing purposes. That's because, the Raceway asserts, the Webers' allegations of injury are based solely on previous use of or access to the portion of the river that is adjacent to the Raceway's property, such use or access having been gained by crossing over its property. The Raceway argues that because the Webers failed to demonstrate continued access to that portion of the river by other means, they failed to show that they have suffered a cognizable injury as a result of the Raceway's discharges. *See Conservation Council of N.C. v. Costanzo*, 505 F.2d 498, 502 (4th Cir. 1974) (holding that without the possibility of future use of the area, plaintiffs failed to show a sufficient injury for standing purposes). As previously found, however, the Webers continue to have access to the portion of the river adjacent to the Raceway's property via Kings Gate Road and Crown Road. Although the evidence regarding the Webers' continued access to this area is somewhat meager, the Court finds that it is sufficient to show, for purpose of the standing analysis, that the Webers have been and will be injured by the Raceway's discharges.

The second element--whether the injuries suffered by the

Webers are "fairly traceable" to the Raceway--has also been met. The Webers need not demonstrate "'to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs.'" *Id.* (quoting *Powell Duffryn*, 913 F.2d at 72). Rather, they need only show a substantial likelihood that the Raceway's conduct caused their harm, and

> this likelihood may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Powell Duffryn, 913 F.2d at 72; *see also Cedar Point Oil Company*, 73 F.3d at 557 & 558 n.24 (applying the *Powell Duffryn* test, but noting that "some 'waterways' covered by the [Clean Water Act] may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing").

The evidence admitted at trial and during the injunction hearing demonstrates that the Raceway is discharging pollutants into the Clear Fork of the Trinity River without a permit for those discharges. As previously found, the Webers continue to have access to and an interest in this portion of the waterway. Furthermore, the Webers testimony and the photographic evidence submitted by Plaintiffs reflect that soon after Trinity Meadow's discharging activity began, the aesthetic, recreational, and environmental value of the portion of the river adjacent to its property significantly declined. Plaintiffs have shown a substan-

tial likelihood that this decline is a result of the Raceway's discharges. Consequently, the Court finds that the Webers' injuries are fairly traceable to the actions of the Raceway.

To satisfy the third requirement of the standing analysis, the Webers must demonstrate that their injuries likely will be redressed by a decision in their favor. "[T]he redressability factor focuses upon the connection between the plaintiff's injury and the judicial relief sought." *Powell Duffryn*, 913 F.2d at 73. This element of the standing analysis is satisfied because requiring the Raceway to submit to the regulatory process and comply with the terms of an NPDES permit means that the river and its habitat will be better protected, and the Webers may again enjoy the river and the wildlife that once was a part of the river. Indeed, submission to the regulatory process or cessation of the discharging in the absence of a permit will prevent further compromise of the river. Furthermore, the imposition of penalties for the Raceway's unlawful discharges will serve as a deterrent to both the Raceway and other polluters. As a result, the Court finds that the Webers' injury is likely to be redressed by the relief requested.

As indicated, however, the Court finds that the remaining plaintiffs have failed to demonstrate the three elements of constitutional standing regarding their Clean Water Act claims. As the Supreme Court has held, these three elements--(1) an injury in fact, (2) which is fairly traceable to the defendant's challenged actions, and (3) which is likely to be redressed by a favorable

decision--must be established by the requisite degree of proof at every stage of the proceeding:

> The party invoking federal jurisdiction bears the burden of establishing these elements [of constitutional standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (internal citations omitted). The remaining plaintiffs failed to present any evidence that would be admissible at trial demonstrating each of these elements.[2] Plaintiffs have urged that the affidavits submitted in support of their request for a preliminary injunction are sufficient to establish that each plaintiff has suffered injuries as a result of the Raceway's activities. (Pls.' Jan. 17, 1995 Mem. in Opposition to Defs.' Mot. for J. at 3-4). In support of this argument, Plaintiffs cite *Friends of the Earth v. Conrail*,

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[2]The only other plaintiff who even testified regarding use of the river was Leslie Fine. Mr. Fine testified at trial that he and his family went to the Clear Fork of the Trinity River on nature hikes and to fish. No testimony was elicited, however, tending to show that he and his family no longer engage in these activities, or that their failure to pursue these activities is a result of Trinity Meadows's pollution into the river. Thus, it is not clear that Mr. Fine has suffered an injury which is fairly traceable to Trinity Meadows's actions.

768 F.2d 57, 60-61 (2nd Cir. 1985). The *Friends* case, however, involved an appeal from a district court's grant of summary judgment. The appellate court found that the district court had correctly concluded, based upon the affidavits submitted by the plaintiffs, that the plaintiffs had standing to pursue their Clean Water Act claims. Because the case had been decided at the summary judgment stage, consideration of the affidavits to establish standing was proper. *See* Fed. R. Civ. P. 56(c). In accordance with *Lujan*, however, because this case proceeded to trial, the affidavits submitted in support of Plaintiffs' request for a preliminary injunction are insufficient to carry Plaintiffs' burden at trial.

The Raceway has argued that the unlawful discharges are not continuing and that as a consequence Plaintiffs' action is moot. The Supreme Court has held that, in order for plaintiffs to maintain standing under the Clean Water Act, the alleged violations must not be wholly in the past, since § 505(a) of the Act does not confer federal jurisdiction over citizen suits for wholly past violations. *See Gwaltney of Smithfield, Ltd v. Chesapeake Bay Foundation*, 484 U.S. 49, 56-63 (1987). The Fifth Circuit has adopted a two-part test for determining whether Plaintiffs have proven their allegations of continuing violations. *See Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1064 (5th Cir. 1991). The test permits a plaintiff to demonstrate the existence of a continuing violation by either (1) proving that violations continued on or after the date of filing the complaint, or (2)

presenting evidence which supports a reasonable inference that there is continuing likelihood of intermittent or sporadic violations. *Id.*

Plaintiffs' complaint was filed on April 13, 1992. The evidence at trial clearly established discharges of pollutants after that date, as reflected in the Court's findings of fact. Furthermore, in its opinion denying Plaintiffs' request for a preliminary injunction filed on June 23, 1992, the Court found that the Raceway's violations were of a continuing nature. As a result, the Court finds that the Webers have standing to pursue their Clean Water Act claim.

C. The Clean Water Act

The objective of the Clean Water Act is to restore and maintain the waters of the United States. *See* 33 U.S.C.A. § 1251(a) (West 1986 & Supp. 1995). Congress established the National Pollution Discharge Elimination System ("NPDES") permit program as the primary means for enforcing effluent limitations imposed to achieve the Act's objectives. *See Carr*, 931 F.2d at 1058. The discharge of pollutants into waters of the United States is unlawful unless one obtains an NPDES permit and complies with its terms. *Id.*; 33 U.S.C.A. § 1311(a), § 1342 (West 1986 & Supp. 1995). As the Supreme Court has explained:

> Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards--including those based on water quality--into the obligations (including a timetable for compliance) of the individual discharger, and [the Act]

> provide[s] for direct administrative and judicial enforcement of permits. With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of [the Act] on which the permit conditions are based. In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under [the Act].

Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205 (1976) (internal citations omitted).

Under the Act, the term "discharge of pollutants" means "any addition of any pollutant to navigable waters from any point source, ..." 33 U.S.C.A. § 1362(12) (West 1986). The definition of "pollutant" includes solid waste, sewage, garbage, biological materials, and wrecked or discarded equipment. *Id.* § 1362(6). Navigable waters means the waters of the United States, which, as previously found, includes the Clear Fork of the Trinity River. *See id.* § 1362(7). The term "point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14) (West Supp. 1995). "Point source" does not include, however, "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*

Thus, the Act defines "point source" to include a "concentrated animal feeding operation." *Id.*; *see also* 40 C.F.R. § 122.23(a)

(1994) ("Concentrated animal feeding operations are point sources subject to the NPDES permit program"). An animal feeding operation is a lot or facility where

> (i) Animals . . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
> (ii) Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. § 122.23(b)(1) (1994). An animal feeding operation is concentrated if either of the following criteria are met: (1) the operation stables or confines and feeds or maintains over 500 horses for a total of forty-five days or more in any twelve-month period, or (2) the operation discharges pollutants into navigable waters either through a man-made ditch, flushing system, or other similar man-made device, or directly into waters of the United States, and it stables or confines and feeds or maintains more than 150 horses for forty-five days or more in any twelve-month period. *Id.* at 122.23(b)(3) & app. B. (1994); 58 Fed. Reg. 7635 (Feb. 8, 1993). Even if the operation meets one of the foregoing criteria, however, it is nevertheless excepted from the definition of a CAFO if it discharges only in the event of a twenty-five year, twenty-four hour storm event. 40 C.F.R. § 122 app. B (1994); 58 Fed. Reg. 7610, 7635 (Feb. 8, 1993).

As previously found, the Raceway stables or confines and feeds or maintains more than 500 horses for more than forty-five days in any twelve-month period in its barn area. Furthermore, crops, vegetation, forage growth, and post harvest residues are not

sustained in the normal growing season in the barn area. Finally, because the Raceway discharges equine waste and muck from its barn area whenever it rains, the twenty-five year, twenty-four hour storm event 'exception' does not apply. As a result, the Court finds that the Raceway's barn area constitutes a concentrated animal feeding operation, and thus a point source, under the Act.

There are other sources of pollutants on the Raceway's facility, including dump trucks, cement trucks, and the outfall points for the drainage system in the area surrounding the barns, all of which constitute point sources independent of the CAFO area. *See Concerned Area Residents for the Environment v. Southview Farm*, 34 F.2d 114, 118-19 (2nd Cir. 1994) (holding that vehicles that spread manure on fields which drain into a navigable water are point sources, as is a pipe under a stonewall leading into a ditch that leads into a stream). The Raceway or persons acting at their behest have, on various dates, caused discharges of pollutants from these other point sources into the Clear Fork of the Trinity River. Because it is discharging pollutants from various point sources, the Raceway is bound by the requirements of the NPDES permit program as set forth in the Act and accompanying regulations.

1. The Raceway's Application for an Individual NPDES Permit for Concentrated Animal Feeding Operations

At the time that this lawsuit was filed, the Raceway did not have an NPDES permit. On May 6, 1992, approximately three weeks after suit was filed, the Raceway applied for an individual NPDES permit for CAFOs. A pending permit application, however, is

insufficient to avoid the consequences of the Act. Rather, obtaining an NPDES permit prior to discharging pollutants into a water of the United States and complying with its terms is a prerequisite to a lawful discharge of pollutants. *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 696 & n.8 (D.C.Cir. 1975); *see also* 58 Fed. Reg. at 7617 (noting that an NPDES "permit application is to be filed 180 days prior to discharging into waters of the U.S.") (emphasis in original). The only permit application shield established by the Act was for permit applications pending prior to December 31, 1974. *See* 33 U.S.C.A. § 1342(k) (West 1986). "[O]therwise there is no shield from the requirement that all discharges--at the time made--must be pursuant to an NPDES permit." *Menzel v. County Utils. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983). Thus, the Raceway's May 6, 1992 application has no retroactive effect, nor does it, ipso facto, provide the Raceway with permit coverage for discharges of pollutants that occurred after that date.

2. Region VI's General Permit

On February 8, 1993, Region VI of the EPA promulgated final regulations in which it authorized the discharge of pollutants from CAFO point sources under certain conditions. *See* 58 Fed. Reg. 7610 (Feb. 8, 1993). This "general" permit became effective on March 10, 1993 and will expire on March 10, 1998. *Id.* at 7627. The Fifth Circuit has explained the difference between an individual and general NPDES permit:

There are two types of NPDES permits: individual and

> general. Typically, EPA will promulgate a nationally uniform "effluent limitation" on the discharge of a particular pollutant and implement that limitation in the form of individual NPDES permits issued to entities discharging that pollutant. See 33 U.S.C. §§ 1311, 1342. Where EPA has not yet promulgated such an effluent limitation, however, it may regulate the discharge of pollutants by issuing a general NPDES permit that applies to a class of similar entities located in a particular geographical region.

Cedar Point Oil, 73 F.3d at 552 n.10. The Raceway claims that, under the terms of the general permit, its pending application for an individual NPDES permit automatically provides it with coverage under the general permit and thus a shield for all discharges from its CAFO area that occurred after the general permit's March 10, 1993 effective date.

In support of its argument, the Raceway cites the portion of the general permit regulations regarding coverage and eligibility under the permit, which provides, in pertinent part, as follows:

> 2. *CAFOs With Expired Permits or Pending Applications.* Upon the submittal of a Notice of Intent all facilities which have expired permits and have reapplied in accordance with 40 CFR 122.21(d); and all facilities which have submitted applications in accordance with 40 CFR 122.21(a) are automatically covered by the terms of this permit. A permittee may request to be excluded from coverage by this permit by applying for an individual permit in accordance with 40 CFR 122.28(b)(3)(iii).

Id. The Raceway's application for an individual permit was "submitted . . . in accordance with 40 CFR 122.21(a) . . . ." *Id.* As previously found, however, the Raceway did not file an NOI to be covered under the general permit. The Raceway contends that the NOI requirement applies only to the first half of the first sentence of this regulation--that is, the portion of the first

sentence preceding the semi-colon. Thus, following the Raceway's argument, facilities that have an expired permit but have reapplied for an individual permit in accordance with 40 C.F.R. 122.21(d) must file an NOI to obtain coverage under the general permit, whereas facilities that have never been covered under an individual permit but have submitted an application for an individual permit in accordance with 40 C.F.R. 122.21(a) are automatically covered by the general permit without having to file an NOI, a position with which the Court tentatively agreed at trial. The Raceway's argument, in essence, centers around the placement of the semi-colon in the sentence. The Raceway argues that because of the semi-colon, Region VII intended that all facilities with pending applications for an individual permit which previously had not been permitted would be automatically included in coverage under the general permit, regardless of whether they filed an NOI.

The Court readily admits that it has struggled with this issue. After review of this matter once again, however, the Court finds the Raceway's argument unpersuasive and therefore must reverse the tentative conclusion it reached at trial regarding this issue. Contrary to the Raceway's interpretation of the coverage and eligibility regulation, another portion of the regulations specifically requires NOIs from all facilities desiring coverage under the general permit:

> *E. Notification Requirements*
>
> 1. Owners or operators of facilities authorized by this permit shall submit a Notice of Intent (NOI) to be covered to the Director. The form of the Notice of

> Intent for this permit is in appendix B of this permit. Notifications must be made within 90 days of issuance of this permit or upon completion of new facility. . . .

58 Fed. Reg. at 7628. This language clearly requires that anyone claiming coverage under the general permit, regardless of whether they have an expired individual permit, file an NOI to be covered under the general permit with the appropriate regulatory authorities.

Additionally, upon further reflection, it appears to the Court that interpreting the coverage and eligibility regulation in the manner suggested by the Raceway would be nonsensical. The Raceway's interpretation would result in automatic coverage for facilities with pending applications that have never been covered by an individual permit, while requiring facilities with pending applications that were once covered by an individual permit, and thus which were, prior to the expiration of their individual permit, presumably complying with all of the requirements of coverage under that permit (such as monitoring and reporting the nature and degree of discharges) to file an NOI. It seems to the Court that if compliance should be automatic for either group, it would be for the latter (the facilities with expired permits) rather than the former (facilities who have never been permitted).

Furthermore, as pointed out by Plaintiffs, certain language in the preamble to the regulations supports the interpretation suggested by Plaintiffs--that all facilities which have applied for an individual permit, regardless of whether they have an expired individual permit, must file an NOI to obtain coverage under the

general permit. A preamble accompanying a regulatory enactment may be consulted as a secondary source of interpretation. *Martin v. Occupational Safety and Health Review Commission*, 941 F.2d 1051, 1056 (10th Cir. 1991). The portion of the preamble upon which Plaintiff relies provides, in pertinent part, as follows:

> 6. Many persons supported the concept of general permit coverage with . . . no submittal of a notice of intent to the Director. However, many persons, state and federal agencies expressed concern that EPA would not have a record of the permittees for enforcement of the permit. Many commenters stated that if EPA was not going to track the permittees directly, it should not impose the program and leave CAFO regulation up to the states.
>
> Region 6 agrees that a Notice of Intent is an appropriate tool in confirming which facilities are covered by the terms and conditions of the general permit. Region 6 is including a NOI form as appendix B of the general permit. EPA believes this will enhance the Region's ability to track and enforce the terms of the general permit.

58 Fed. Reg. at 7617. This language of the preamble supports Plaintiff's position that submission of an NOI is always required to obtain coverage under the general permit.

By filing an NOI to be covered by the general permit, owners of facilities which intend to be so covered notify the federal and state regulatory authorities of their intent to comply with the permit's terms. Without the NOI, the agencies have no notice or record of which facilities intend to be covered by, and therefore should be complying with the terms of, the general permit. A pending application for an individual permit does not serve the same purpose; it only provides notice that an owner of a facility is seeking to obtain an individual NPDES permit for certain discharges. Indeed, the preamble language relied upon by Plaintiff

and quoted above indicates that many commenters on the proposed rules recognized this very problem. *See id.* As a result, the NOI requirement was included in the final regulations.

The Raceway has referred the Court to additional preamble language which provides that "[i]n accordance with Part I.B.3 of the general permit[,] facilities which have applied for an NPDES permit will be covered automatically by this permit." *Id.* at ¶ 7. The Raceway urges that this language supports its position that it automatically obtained coverage under the general permit by virtue of its pending application for an individual NPDES permit.

As indicated at trial, the Court believes that this language of the preamble contains an error, in that the reference to "Part I.B.3" should instead read "Part I.B.2." The language in the final regulations found at Part I.B.3 concerns the manner in which new facilities desiring coverage under the general permit obtain such coverage, and wholly fails to mention "facilities which have applied for an NPDES permit . . . ."[3] *Id.* Additionally, the language regarding "CAFOs With Expired Permits or Pending Applications" found in the current regulations at Part I.B.2, *see* 58 Fed. Reg. at 7627, was located in the proposed regulations at Part I.B.3, *see* 57 Fed. Reg. 32475, 32488 (July 22, 1992). Thus, it appears to the Court that the preamble language quoted by the Raceway simply was not modified to reflect that the portion of the

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[3]Indeed, the language of Part I.B.3 of the final regulation requires that new facilities desiring coverage under the general permit submit an NOI to obtain such coverage.

regulations to which it refers was moved from Part I.B.3 in the proposed regulations to Part I.B.2 in the final regulations.

Allowing for this error, the Court finds that this language of the preamble simply means that facilities which have a pending individual NPDES permit application on file on the general permit's effective date have automatic coverage under the general permit in accordance with Part I.B.2 of the regulations. As indicated above, the Court believes, for the reasons already stated, that Part I.B.2 of the regulations provides coverage under the general permit for facilities with pending individual NPDES permit applications, regardless of whether they have an expired individual permit, only upon the filing of a NOI. Thus, the Court believes that the preamble language relied upon by the Raceway means simply that coverage is automatic upon filing an NOI, as is required by Part I.B.2, which does not help the Raceway's position. As the Raceway failed to submit an NOI within ninety days of the effective date of the general permit, it is not entitled to coverage thereunder.

3. The Storm Water Permit

Moreover, the Court concludes that the Raceway's storm water discharge permit does not cover its discharges of pollutants. *See* 57 Fed. Reg. 41236, 41305 (Sept. 9, 1992). The permit itself only authorizes discharges of storm water; discharges of material other than storm water require an NPDES permit for that particular discharge. *Id.* at 41307, Part III.A.1 & 2. The Court concludes that the Raceway's discharges do not consist solely of "storm water associated with industrial activity" as that term is defined in the

regulations. *See id.* at 41319, Part X. As a result, the Raceway is required to have a separate permit that authorizes its discharges of pollutants.

In addition, the regulations specifically state that certain storm water discharges associated with industrial activity are not authorized by the storm water permit. *Id.* at 41305, Part I.B.3. Among the discharges that are not authorized are those that are subject to an existing effluent limitation guideline addressing storm water, including "feedlots (40 C.F.R. Part 412) . . . ." *Id.* at 41305, Part I(B)(3)(ii)(b) & n.2. Title 40 of the Code of Federal Regulations at part 412 specifically defines feedlots to include "horses--stables (race tracks)." 40 C.F.R. § 412.10 (1994). The Court concludes that the Raceway's discharges of equine waste are specifically excluded from coverage under the general storm water permitting program.

D. Penalties

According to the Clean Water Act, any entity that violates the Act shall be subject to a civil penalty not to exceed $25,000 per day for each violation. 33 U.S.C.A. § 1319(d) (West Supp. 1995). "Civil penalties are mandatory once Clean Water Act violations are found, although the amount to be assessed is wholly within the discretion of the court." *Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1394 (D. Haw. 1993). In exercising its discretion, "the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith

efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C.A. § 1319(d) (West Supp. 1995). The legislative purposes of the Clean Water Act's civil penalty provision--restitution, deterrence, and retribution--should be kept in mind when assessing penalties. *See Hawaii's Thousand Friends*, 821 F. Supp. at 1394 (citing *Tull v. United States*, 481 U.S. 412, 422-23 (1987)). "To achieve the goal of deterrence, a penalty must be high enough so that the discharger cannot 'write it off' as an acceptable environmental trade-off for doing business.'" *Id.* (citing *PIRG v. Powell Duffryn Terminals*, 720 F. Supp. 1158, 1166 (D.N.J. 1989) ("A civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business.")).

The Clean Water Act provides a two-step process for courts to use in setting the appropriate civil penalty. *See* 33 U.S.C.A. § 1319(d) (West Supp. 1995); *see also Hawaii's Thousand Friends*, 821 F. Supp. at 1394-95. Initially, a court must calculate the maximum penalties that may be assessed against the violator. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990); *Hawaii's Thousand Friends*, 821 F. Supp. at 1395. Then, using the maximum penalty as a guideline, the court must determine the actual penalty by analyzing the specific statutory factors. *Tyson Foods*, 897 F.2d at 1142; *Hawaii's Thousand Friends*, 821 F. Supp. at 1395. "If the court chooses not to impose the maximum penalty, 'it must reduce the fine in accordance with the factors

spelled out in Section 1319(d); clearly indicating the weight it gives to each of the factors and the factual findings that support its conclusion.'" *Hawaii's Thousand Friends*, 821 F. Supp. at 1395 (quoting *Tyson Foods*, 897 F.2d at 1142).

As indicated in the Court's findings of fact, Plaintiffs have proven twenty-three violations of the Clean Water Act by the Raceway. As a result, the maximum possible penalty to be assessed against the Raceway is $575,000. After careful consideration of the factors enumerated in the Clean Water Act, however, the Court finds that the maximum possible penalty should be reduced.

Consideration of the first factor, seriousness of the violations, mitigates against imposition of the full penalty. In determining the seriousness of the violations, "the court looks to several factors, including, but not limited to: (1) the number of violations; (2) the duration of noncompliance; (3) the significance of the violation (degree of exceedance and relative importance of the provision violated); and (4) the actual or potential harm to human health and the environment." *Hawaii's Thousand Friends*, 821 F.Supp. at 1383 (citing EPA, "Clean Water Act Penalty Policy," Feb. 11, 1985, at 3-5). The number of violations proven by Plaintiff--twenty-three--is not insignificant, but is not, in and of itself, sufficiently compelling to justify the maximum penalty. Although the Court has found that the Raceway discharges waste into the river every time it rains, Plaintiffs presented insufficient information upon which to base a finding regarding the exact dates of rain since the Raceway's operations began. The Court suspects

that these dates are numerous, but is not inclined to factor the suspected large number of these dates into the penalty equation based upon mere suspicion. The duration of the Raceway's noncompliance has, however, been significant, in that noncompliance commenced at the same time the Raceway's operations commenced in 1991, and it continues to this day. Because the Raceway has no permit for its discharges, the violations are significant. Nevertheless, the Raceway's discharge of pollutants is largely, if not wholly, comprised of natural, organic materials, such as wood shavings and equine waste, as opposed to, for example, a toxic chemical. Furthermore, although the testimony and evidence presented by Plaintiffs demonstrates the degradation caused to the river by the Raceway's discharges, no evidence was presented demonstrating that the discharges caused potential harm to human health.

As for the second factor--economic benefit resulting from the violation--it is clear that the Raceway has benefited from its violations, although the exact amount of that benefit has not been demonstrated. Obviously, the Raceway has benefited economically by not expending the funds that would be necessary to achieve compliance with the CAFO general permit's terms, such as building retaining ponds and monitoring and treating the waste that is discharged into the river, or the presumably greater cost of preventing the discharges altogether. As a result, this second factor is not mitigating.

The third factor--history of violations--also provides the

Raceway with no relief. As previously mentioned, the Raceway has been engaging in the unpermitted discharges since its operations began and presumably continues to engage in the unpermitted discharges to this day.

Similarly, the Court cannot find that the Raceway made sufficient good faith attempts to comply with the applicable requirements to warrant a reduction in the amount of the penalty. The Raceway failed to apply for an individual NPDES permit until one day prior to the preliminary injunction hearing. This delay, however, appears to the Court to be the result of a good faith belief on the part of the Raceway that it was not required to obtain an NPDES permit. At the preliminary injunction hearing, Jack Johnson, the principal stockholder, president, and chief executive officer at the Raceway, testified that he did not believe the Raceway was polluting the river, that none of the professional engineers used in establishing the Raceway's drainage and grading plan indicated that an EPA permit was required, and that the Raceway is ready, willing, and able to comply with any of the EPA's requirements. Indeed, Johnson testified that, apparently as a result of the filing of this lawsuit, the Raceway applied for an individual NPDES permit, "just to be certain in the event [it] did need one." (Prelim. Inj. Hr'g Tr. Vol. II at 41.) Nevertheless, the Raceway did not discontinue its discharges while waiting for its application for an individual permit to be acted upon. The Raceway further urges, however, that once the general permit for CAFOs was implemented, it believed in good faith that by virtue of

its application for an individual NPDES permit it was covered under the general permit, a position with which the Court initially agreed. Juxtaposed against this profession of a good faith belief that the Raceway's discharges were covered by the general permit, however, is the fact that the Raceway has been doing little, if anything, to actually comply with the general permit's terms. As a result, the fourth statutory factor does not provide the Raceway with a safe harbor.

Nevertheless, the Court finds that the fifth statutory factor weighs in favor of a significant reduction in the amount of the penalty. Imposition of the full penalty will have a more drastic effect on the Raceway than is needed to ensure future compliance. The testimony at trial indicates that although the Raceway has been profitable since it opened, most of those profits go to debt-servicing and taxes, such that the Raceway has a definite liquidity problem. The Raceway's federal tax returns reflect fairly large distributions to its shareholders. Nevertheless, because the Raceway is a subchapter S corporation, taxes on the Raceway's profits are paid to the IRS by its shareholders, rather than by the Raceway itself. Thus, the distributions to the shareholders were made, in accordance with the Raceway's close corporation agreement, to cover those tax obligations and do not represent a return on the shareholder's investment. Indeed, Jack Johnson testified that he has not been able to take his full salary because the funds simply were not available. As a result, the Court finds that the fifth factor is mitigating.

The Court therefore finds that the full $575,000 penalty should not be assessed against the Raceway. Rather, after consideration of all of the statutory factors, the Court finds that $10,000 per violation is an appropriate penalty. As a result, penalties in the amount of $230,000 will be assessed against the Raceway, which penalties shall be paid to the United States Treasury. *See Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1356 (9th Cir. 1990) ("if the payments required . . . are civil penalties within the meaning of the Clean Water Act, they may be paid only to the U.S. Treasury"); *Hawaii's Thousand Friends*, 821 F. Supp. at 1396 (providing for payment of civil penalties assessed under the Clean Water Act to the United States Treasury).

Furthermore, the Court finds that the Webers are "prevailing parties" for purposes of the attorneys' fees and costs provision of 33 U.S.C. § 1365(d). The Webers may submit an application for any award of their reasonable attorneys' fees and costs incurred in prosecuting their Clean Water Act claims within thirty days after entry of this opinion. Because the remaining Plaintiffs failed to demonstrate standing to pursue their Clean Water Act claims, however, they are not prevailing parties and are therefore not entitled to recover their fees and costs. Similarly, the Raceway also is not a prevailing party for purposes of § 1365(d), and its counterclaim for attorneys' fees and costs therefore will be dismissed with prejudice.

A final judgment consistent with this opinion will issue this same day.

SO ORDERED.

SIGNED June 20, 1996.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE